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Supreme Court, U.S.
FILED

No. 03 336 AUG 29 2003

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

LUCIANO D. SANCHEZ,

Petitioner,

v.

RON WARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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90 PP

QUESTIONS PRESENTED

1. Whether the Petitioner was factually innocent of the weapon charge such that the statute of limitations period for the filing of a habeas corpus petition was equitably tolled.

2. Whether the Petitioner was factually innocent of possession of a firearm during the commission of a felony, such that the statute of limitations period for the filing of a habeas corpus petition was equitably tolled.

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The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Tenth Circuit was entered on June 6, 2003. Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), the Petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution and Statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the following provisions of the Statutes of Oklahoma, i.e. 21 O.S. 1981, Section 1287:

> "Any person who while committing or attempting to commit a felony uses a firearm or any other offensive weapon in such commission or attempt, whether the

firearm is loaded or not, or who uses a blank or imitation firearm capable of raising in the mind of one threatened with such device a fear that it is a real firearm, or who uses an air gun or carbon dioxide or other gas-filled weapon, electronic dart gun, knife. dagger, dirk, switchblade knife. blackjack, axe, loaded cane, billy, hand chain or metal knuckles, in addition to the penalty provided by statute for the felony committed or attempted, shall be guilty of a felony for the use of such weapon or device, which shall be a separate offense, and shall be punishable by imprisonment in the penitentiary for a period of not less than two (2) years nor for more than ten (10) years for the first offense, and for a period of not less than ten (10) years nor for more than thirty (30) years for any second or subsequent offense."

2. This case also involves Section One of the Fourteenth

Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. This case also involves 28 U.S.C. Section 2244:

> "(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
>
> (A) the date on which the judgment became final by the conclusion of direct review or the ex-

piration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such by State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court. if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim

is pending shall not be counted toward any period of limitation under this subsection."

4. This case also involves Article 1, Section 9, Clause 2 of the Constitution of the United States:

"The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."

5. This case also involves the following provisions of the Statutes of Oklahoma, i.e. 21 O.S. 1981, Section 51:

"Every person who, having been convicted of any offense punishable by imprisonment in the penitentiary, commits any crime after such conviction is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that upon a first conviction an offender would be punishable by imprisonment in the penitentiary for any term exceeding five (5) years,

such person is punishable by imprisonment in the penitentiary for a term not less than ten (10) years.

2. If such subsequent offense is such that upon a first conviction the offender would be punishable by imprisonment in the penitentiary for five (5) years, or any less term, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding ten (10) years.

3. If such subsequent conviction is for petit larceny, or for any attempt to commit an offense which, if committed, would be punishable by imprisonment in the penitentiary, then the person convicted of such subsequent offense is punishable by imprisonment in the penitentiary for a term not exceeding five (5) years..."

STATEMENT OF THE CASE

For background purposes, the Statement of Facts, propounded by the Attorney General of Oklahoma in her Brief of Appellee filed on direct appeal in the Oklahoma Court of Criminal Appeals in Case Number F-89-1204, wherein the Petitioner is referred to as the "defendant", follows:

> On Tuesday, October 18, 1988 the defendant and his co- defendant, Teresa Ann Powers, were arrested by Officer Real of the Grady County Police as he served a search warrant at the James residence in Grady County. The events which led up to this arrest are detailed below.
>
> On Thursday, October 14, 1988, co-defendant Powers came to stay at the James house (Tr. 439-440, 466). She had been living with her brother, Dan Powers (Tr. 436). Co-defendant Powers testified that the defendant slept or stayed at the James residence

on and off from October 14,1988 until their arrests on October 18, 1988 (Tr . 467).

On Saturday, October 16, 1988, Lieutenant Tony Willis of the Chickasha Police Department received an anonymous telephone call informing him that an illegal amphetamine laboratory had been moved from the Dan Powers residence to the James residence in Grady County (Tr. 120, 154-158, 429). Officer Lt. Willis drove by the James residence at approximately 10:30 p.m. and could detect the strong, distinctive smell of phenylacetic acid (Tr. 121). From his experience investigating drug manufacturing and other crimes, Lt. Willis associated phenylacetic acid with the manufacture of amphetamines (Tr. 121-122).

Lt. Willis and other officers returned to the James property shortly after noon on October 17,1988. These officers staked out the James property from a

distance of 50 yards for a period of just under two hours that afternoon (Tr. 123, 158-159). Lt. Willis could detect the strong smell of ether emanating from the James' barn (Tr. 123). Ether is also used in the manufacture of amphetamines (Tr. 123). An enclosed semi-trailer van was parked in between the James' house and barn (Tr. 124-125, 173-174). Inside the barn, Lt. Willis observed an El Camino with Texas license plates. A check of these license plates later that day revealed that this car, registered to Steven Paul Shafer of Ft. Worth, Texas, had been used to purchase chemicals on two occasions in Texas (Tr. 125, 155). Lt. Willis conducted additional surveillance of the James' properties from approximately 9:30 p.m. until midnight on October 17, 1988 (Tr. 168-169).

Lt. Willis prepared an affidavit for a search warrant of the James property, seeking evidence of the illicit drug laboratory (Tr. 161-162, Sanchez Exhibit 1). This search warrant was granted, and authorized the search of the residence, barns, outbuildings, trailers, and vehicles there (Powers Exhibit 1). Neither the defendant nor co-defendant Powers were mentioned by name in either the search warrant or Lt. Willis' supporting affidavit (Tr. 158-162). The objective of this search included the chemicals, equipment and fixtures of the laboratory itself, as well as monies, records, and other instrumentalities associated with the use, possession, distribution, and manufacture of amphetamines (Powers Exhibit 1).

At 7:15 a.m. on October 18, 1988, Lt. Willis and other officers executed that search warrant. Officer David Real of the, Chickasha Police assisted and had

the responsibility for searching the house (Tr. 173). Officer Real and three other officers knocked on the front door of the house and announced they were serving the search warrant (Tr. 175). After Officer Real had knocked several times, Pamela Jones, the owner, answered the front door and admitted the officers (Tr. 175-176, 252). Both Mrs. Jones and her daughter, Paige, were wearing bedclothes (Tr. 175,257). Officer Real ordered both women to lie down on the floor and proceeded toward the rear of the house (Tr. 176).

While Officer Real knocked on the front door of the house, Sheriff Rodney Taylor, Sheriff of Grady County, waited at the rear of the house (Tr. 276) and observed co-defendant Powers trying to leave by way of one of the back, eastern side windows (Tr. 277). Sheriff Taylor saw a white object in her hand (Tr. 279). Sheriff Taylor was unable to identify this ob-

ject. At the time she tried to climb out the back window, co-defendant Powers was fully dressed (Tr. 276).

As Officer Real walked back toward the rear of the house, he met the defendant, who was walking out of the southeast bedroom (Tr. 176, 276). The defendant was wearing only a pair of jeans (Tr. 258). Officer Real ordered the defendant to lie down on the floor, handcuffed him, and gave him Miranda warnings (Tr. 176, 213-215). Seconds later, co-defendant Powers emerged from the northeast bedroom, and was similarly restrained and given Miranda warnings (Tr. 177, 213-214). Officer Real could detect the strong, distinctive odor of phenylacetic acid throughout the house, on the defendant, co-defendant, and in both the southeast and northeast bedrooms (Tr. 186-187, 214-215, 222, 225).

While Officer Real was searching the house, Lt. Willis and others prepared to search the semi-trailer which they suspected housed the drug laboratory (Tr. 127). There was a strong smell of ether, phenylacetic acid, and other odors associated with the manufacture of drugs immediately outside the van (Tr. 136). The officers could not break the lock on the van (Tr. 128). Officer Cunningham went inside the house asked the defendant if he had a key to the van (Tr. 216,269). The defendant stated he had a key, which was retrieved from his right front jeans pocket (Tr. 216). This key opened the lock to the van. Inside the defendant's wallet, Officer Real found $2,297.00 in cash (Tr. 217, 281).

Inside the van these officers found a fully functioning clandestine drug laboratory, capable of producing 10,000 grams (22-24 pounds) of ampheta-

mines every 30 hours (Tr. 128-138, 332-333, 431). Lt. Willis found 40 pounds of phenylacetic acid in the laboratory (Tr. 140, 152-153).

After restraining the defendant and co-defendant Powers, Officer Real searched the bedrooms from which they had emerged. Inside the southeast bedroom from which the defendant had emerged, Officer Real found a plastic bag containing a golf-ball sized quantity of amphetamines in the desk drawer (Tr. 183). In an ammo can in the closet, Officer Real found several packages of amphetamines (Tr. 188, 191, 209). Officer Real searched a blue-green tote bag at the foot of the bed after the defendant asked if he could get his shirt from there (Tr. 249). Inside, Officer Real found a .38 caliber pistol (Tr. 181-182). There was also an envelope addressed to "Patrick Sanchez" inside. This was later determined to be an

alias of the defendant (Tr. 367-369). There was also a make-up bag, or purse underneath the desk in which the first amphetamines were found (Tr. 184-186). Inside this bag Officer Real found various laboratory supplies (Tr. 184-186). At trial, co-defendant Powers stipulated that this belonged to her (Tr. 406-408). In total, these officers found in excess of 1,000 grams of amphetamines in the southeast bedroom (Tr. 371-374).

Inside the northeast bedroom from which co-defendant Powers emerged, Officer Real found large, white rocks of amphetamines in the upper left drawer of the dresser (Tr. 209).

Subsequent fingerprint analysis matched the prints of the defendant and co-defendant Powers with those found on pieces of equipment inside the laboratory (390-396, 427).

The Petitioner was convicted in the District Court of Grady County, State of Oklahoma, on May 18, 1989, in Case Number CF-88-172, for Manufacturing a Controlled Dangerous Substance, Trafficking in Illegal Drugs, and Possession of a Firearm During Commission of Felony After Former Conviction of a Felony, after having a jury trial, and received, respectively, consecutive sentences of Life plus $50,000.00 fine, 20 years plus $500,000.00 fine, and 250 years. His case was appealed directly to the Court of Criminal Appeals for the State of Oklahoma and affirmed in Case Number F-89-1204 on December 9, 1993. Post-conviction relief was applied for and denied by the District Court of Grady County, Case Number F-89-1204 on September 21, 2001. This denial was appealed to the Court of Criminal Appeals, which entered its affirmance of denial on February 15, 2002. On October 24, 2002, a Petition For a Writ of Habeas Corpus was filed in the United States District Court for the Western Dis-

trict of Oklahoma, in Case Number CIV-02-1495-R, which was denied on January 8, 2003. This denial was appealed to the United States Court of Appeals for the Tenth Circuit which denied a certificate of appealability on June 6, 2003.

BASIS FOR FEDERAL JURISDICTION IN COURT OF FIRST INSTANCE

The Petitioner, an Oklahoma State prisoner, sought a writ of habeas corpus from the United States District Court for the Western District of Oklahoma pursuant to 28 U.S.C. Section 2254.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER WAS FACTUALLY INNOCENT OF THE WEAPON CHARGE SUCH THAT THE STATUTE OF LIMITATIONS PERIOD FOR THE FILING OF

A HABEAS CORPUS PETITION WAS EQUITABLY TOLLED.

The United States Court of Appeals for the Tenth Circuit so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the United States District Court for the Western District of Oklahoma, that the United States Supreme Court needs to exercise its supervisory power.

The Petitioner was convicted of Possession of a Firearm During Commission of Felony After Former Conviction of a Felony pursuant to 21 O. S. 1981, Section 1287. The Oklahoma Court of Criminal Appeals has held, in Pebworth v. State, 1993 OK CR 28, 855 P.2d 605 that: "In order to establish a violation of 21 O. S. 1981, Section 1287, more than mere possession must be established. Proof must be shown of a nexus or connection between the possession of the weapon and the underlying felony." The facts in Pebworth,

supra, are amazingly similar to that of the case at bar. Dixie Ray Pebworth, the Appellant therein, was convicted of Possession of A Controlled Dangerous Substance and Possession of a Firearm While in the Commission of a Felony pursuant to 21 O. S. 1981, Section 1287. He received a 30 year sentence and a 40 year sentence respectively. The Petitioner contended on appeal that his conviction should be vacated and dismissed, since the Statute under which he was charged, i.e. 21 O. S. 1981, Section 1287, did not apply to the facts of his case. The Court stated as follows:

> Section 1287 prohibits the possession of an offensive weapon, during the commission or attempted commission of a felony. In order to establish a violation of this section, more than mere possession must be established. Proof must be shown of a nexus or connection between the possession of the weapon and

the underlying felony. Such connection was not shown in the present case.

The record shows that officers executed a search warrant on a home occupied by Appellant and several other people. The southeast bedroom was shown to belong to Appellant. In that room officers discovered several weapons, including a loaded .22 caliber pistol, quantities of illegal drugs and numerous items of paraphernalia associated with the distribution of the illegal narcotics. The items were seized and Appellant charged with their possession.... he turned himself into the authorities and indicated that the illegal substances and weapons retrieved from the bedroom belonged to him.

.....In conducting our review of the totality of the circumstances in each case we will consider, but not be limited to, factors which indicate (1) The weapon

was used to actually facilitate the commission of the offense; (2) The weapon was possessed or strategically located to be quickly or easily located for use during the commission of an offense; (3) The weapon was intended to be used if a contingency arose or to make an escape; or, (4) The weapon was to be used either offensively or defensively in a manner which would constitute a threat of harm.

Based upon the foregoing, we find the evidence was insufficient to establish that the Appellant possessed the firearm during the commission of a felony. Therefore, the conviction for possession of a weapon during the commission of a felony is DISMISSED and VACATED.

Even if the Petitioner's link to the gun was sufficient to establish his possession, as the result of the Petitioner's having asked the arresting officers whether he could take a shirt

from the bag where the gun was found, there still was certainly no connection either alleged or established between his possession of the weapon and Petitioner's underlying felonies of Manufacturing a Controlled Dangerous Substance and Trafficking in Illegal Drugs. See People v. Honeycutt, 415 N. W.2d 12 (Mich. App. 1987), which is in accord, and so is Graves v. State, 632 So.2d 30 (Ala. Cr. App. 1992). An instruction failing to include elements of the crime constitutes a substantial violation of a Federal constitutional right according to the United States Supreme Court in the case of In re Winship, 397 U. S. 358, 90 S. Ct. 1068, 25 L.Ed.2d. 368 (1970). (basing decision on the Fourteenth Amendment to the Constitution of the United States).

In Milller v. Marr, 141 F. 3d 976 (10th Cir. 1998), the United States Court of Appeals for the Tenth Circuit held that "…..Section 2244 (d)) is not jurisdictional and as a limitation may be subject to equitable tolling.", and that circum-

stances such as a claim of actual innocence may exist where application of the limitations period would possibly render the habeas remedy inadequate and ineffective, and subject to the limitation period to equitable tolling.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER WAS FACTUALLY INNOCENT OF POSSESSION OF A FIREARM DURING COMMISSION OF A FELONY, AFTER FORMER CONVICTION OF A FELONY, SUCH THAT THE STATUTE OF LIMITATIONS PERIOD FOR THE FILING OF A HABEAS CORPUS PETITION WAS EQUITABLY TOLLED

The United States Court of Appeals for the Tenth Circuit so far departed from the accepted and usual course of judicial proceedings, and sanctioned such a departure by the United States District Court for the Western District of

Oklahoma, that the United States Supreme Court needs to exercise its supervisory power.

The Petitioner was actually innocent, in accordance with Miller supra, of a crime susceptible to the enhancement provisions of 21 O. S. 1981, Section 51. In Miller, supra (basing its decision on Article 1, Section 9, Clause 2 of the Constitution of the United States), the Court held that ".... Section 2244(d) is not jurisdictional and as a limitation may be subject to equitable tolling.", and that circumstances such as a claim of actual innocence may exist where application of the limitation period would possibly render the habeas remedy inadequate and ineffective, and subject the limitation period to equitable tolling. The Petitioner cannot be deemed guilty of having committed 21 O. S. 1981 Section 1287 (use of a firearm during the commission of a felony punishable for a period of not less than 2 nor more than 10 years), after former conviction of a felony, pursuant to the enhancement

provisions of 21 O. S. 1981, Section 51 (the Habitual Offender Statute, punishable of a term of not less than 10 years), because Section 1287 is itself an enhancement statute. As stated in Stratmoen v. State, Okl. Cr., Case No. F-2000-292 (April 24, 2001) (See copy in the Appendix), possession of a firearm while committing a felony is not enhanceable under Section 51. In Stratmoen, supra, the Appellant, Joe Stratmoen, was convicted of Unlawful Possession of Controlled Dangerous Drug and Possession of a Weapon While committing a Felony Offense, in violation of 21 O. S. Section 1287, after former conviction of two or more felonies, and he received a 30 year sentence and a 20 year sentence respectively. The Court stated as follows:

> In our analysis of Proposition Two, we begin by recognizing a fundamental rule of statutory construction that "statutes imposing penal sanctions should be strictly construed. "Gilbert v. State, 1982 OK CR 100,

¶ 30, 648 P.2d 1226, 1232; see also Gessman v. State, 1972 OK CR 212, ¶ 12, 500 P.2d 1092, 1095 ("Statutes whose sole purpose is to enhance punishment for second or subsequent convictions, or crime, are purely penal in nature and must be strictly construed."), overruled on other grounds in Berry v. State, 1993 OK CR 41, ¶ 11, 834 P2d 1002, 1005. Section 1287 is relatively unique in the manner in which it operates; it cannot exist without another felony having been first committed or attempted.

It is apparent from the Legislature's enactment of § 1287 that it perceived committing or attempting to commit a felony with the use of a firearm or other weapon posed a more serious threat to public security and was thereby deserving of greater punishment. It is not just the simple possession of the firearm or weapon alone that is punished but is instead the use of

the weapon in combination with a felony act or attempt. The statute creates a special enhancer for the underlying felony or attempted felony; an extra penalty is imposed "in addition to the penalty provided by statute for the felony committed or attempted." 21 O.S. Supp.1999, § 1287.

...

If this Court were to adopt the reasoning of the State and hold that the additional penalty imposed by a §1287 is itself a crime that may be enhanced under Oklahoma's general enhancement statute, 21 O.S. 1991, § 51, then the net effect is that an enhancing statute is itself being enhanced. Such a construction would be akin to that which is prohibited in those situations where a conviction is being used as both an element of the offense and as an enhancer. E.g., Snyder v. State, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654

(Possession of a Firearm After Former Conviction of a Felony cannot be enhanced under 21 0.S. Supp.1985, § 51, by the felony relied upon for the former conviction); Chester v. State, 1971 OK CR 233, ¶ 6, 485 P.2d 1065, 1067 (Escape from the Penitentiary necessarily requires the defendant to be serving a prior felony conviction; the "former felony is implicit in the offense" and "[t]o allow prosecution and enhancement of punishment under § 51 is to add to the maximum punishment allowable. . . for Escape from the Penitentiary" and is therefore improper); cf Ruth v. State, 1998 OK CR 50, ¶¶ 5-14, 966 P.2d 799, 800-01 (indicating the offense of possession of a firearm while under supervision of Department of Corrections may properly be enhanced under 21 0.S.1991, § 51, because that offense can occur without there necessarily being an existing felony conviction).

Other jurisdictions have also held that a circumstance which causes an enhanced penalty cannot be cause for further enhancement under another enhancement statute or the jurisdiction's general recidivist statute. These "double enhancement" circumstances have generally been found Improper unless there exists specific expression by the legislature that the resulting double enhancement was intended. E.g., People v. Jones, 22 Cal. Rptr.2d 753, 754-57 (Cal. 1993)(held it was improper to use the same prior kidnapping conviction to enhance defendant's sentence under two different enhancement statutes); Oliveira v. State, 751 So.2d 611 (Fla. App., Dist. 4, Nov 24, 1999)(where misdemeanor battery was elevated to a felony by reason of its commission upon a law enforcement officer, offense could not be further enhanced under the habitual felony offender statute);

People v. Thomas, 664 N.E.2d 76, 85 (Ill. 1996) ("Double enhancement occurs when a factor already used to enhance an offense or penalty is reused to subject a defendant to a further enhanced offense or penalty."); State v. Chapman, 287 N.W.2d 697, 698 (Neb. 1980)(offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute "felonies" within the meaning of prior felonies that enhance penalties under the habitual criminal statute); State v. Grissom, 956 S.W.2d 514,518 (Tenn. Crim. App. 1997)(use of enhancer that looked to whether the amount of money taken from the victim was particularly great held' to be "double enhancement" where the theft crime being prosecuted had itself been elevated, based upon the amount taken by the accused); cf. Weaver v. State, 702 N .E.2d 750, 752 (Ind. Ct. App. 1998)(fact that operating a vehicle

while intoxicated was made a felony because of prior convictions did not also prohibit it from being further enhanced under habitual substance offender statute where legislature specifically amended such statute to include felony convictions for operating a vehicle while intoxicated).

We find the State could not seek enhancement of Count 2 under Oklahoma's general enhancement scheme set forth at 21 O.S.Supp.1999, § 51.1. The trial court should have instructed the jury the proper range of punishment was two (2) to ten (10) years imprisonment, in accordance with the specific enhancement provisions set forth in 21 O.S. Supp.1999, § 1287. We note the jury imposed the minimum sentence under the range it was given. For the above reasons, we hereby order Appellant's conviction on Count 2 should be AFFIRMED, but his sentence is

hereby MODIFIED to the minimum of two (2) years imprisonment.

See also People v. Honeycutt, 415 N. W. 2d 12 (Mich. App. 1987); and Graves v. State, 632 So.2d 30 (Ala. Cr. App. 1992). An instruction failing to include elements of the crime charged constitutes a substantial violation of a Federal constitutional right according to the United States Supreme Court in the case of In re Winship, supra.

It would be unfair to strictly adhere to the statute of limitations in the Petitioner's case at bar, where he is factually innocent of the weapon violation in that he received a 250 year sentence on a charge where there was no violence and no connection between this charge and the drug charges. If he were deemed guilty of Possession of Firearm During Commission of Felony, he would then have been guilty of an offense that could carry a maximum of only 10 years in the penitentiary, as was decided by Judge Charles S. Chapel in

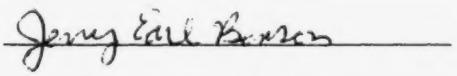
his dissenting opinion on February 15, 2002, in the Oklahoma Court of Criminal Appeals, Case No. PC-2001-799, of the Petitioner's case. The United States Court of Appeals for the Tenth Circuit held, in Gibson v. Klinger, 232 F.3d 799 (10th Cir. 2002), that "Equitable tolling would be appropriate, for example, when a prisoner is actually innocent....."

CONCLUSION

This Court has the opportunity to rectify a serious injustice. The lower Courts departed from acceptable and usual course of proceedings such that the exercise of this Court's supervisory power is appropriate. This Court should grant certiorari and at least determine that the Petitioner is factually innocent of violating 21 O. S. 1981, Section 1287, after former conviction of a felony, which is pursuant to the Habitual Offender Statute, 21 O. S. 1981, Section 51, which amounts to a double enhancer. By so finding, the Court can determine that the statute of limitations is equitably tolled

and that the Petition for a Writ of Habeas Corpus should be granted and the Appellant's sentence on the firearms conviction reduced to not more than 10 years imprisonment.

Respectfully submitted,



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APPENDIX

FILED
United States Court of Appeals
Tenth Circuit

JUNE 6, 2003

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LUCIANO D. SANCHEZ,

Petitioner-Appellant,

v. No. 03-6023

RON WARD,

Respondent-Appellee.

ORDER

Before KELLY, BRISCOE, and LUCERO,

Circuit Judges.

Luciano D. Sanchez, an Oklahoma state prisoner, requests a certificate of appealability ("COA") to appeal the denial of his 28 U.S.C. § 2254 habeas petition. For substantially the same reasons set forth by the magistrate judge and

adopted by the district court in its Order of January 8, 2003, we deny a COA and dismiss.

On May 18, 1989, Sanchez was convicted in Oklahoma state court of manufacturing a controlled substance, trafficking in illegal drugs, and possession of a firearm during the commission of a felony after a prior felony conviction. The Oklahoma Court of Criminal Appeals ("OCCA") affirmed Sanchez's conviction on December 9, 1993. Several years later, on May 17, 2001, Sanchez filed an application for post-conviction relief in the Oklahoma state trial court. This application was denied, and the OCCA affirmed on February 15, 2002. On October 24, 2002, Sanchez filed the instant § 2254 petition in federal court. This petition was dismissed as untimely. Sanchez now seeks to appeal the denial of his § 2254 habeas petition.

Because Sanchez's petition was filed after April 24, 1996, the effective date of the Antiterrorism and Effective

Death Penalty Act ("AEDPA"), AEDPA's provisions apply to this case. See Rogers v. Gibson, 173 F.3d 1278, 1282 n.l (l0th Cir. 1999)(citing Lindh v. Murphy, 521 U.S. 320 (1997)). AEDPA provides that a petitioner may not appeal a denial of habeas relief under 28 U.S.C. § 2254 unless a COA is granted. § 2253(c)(l)(A). A COA may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right." § 2253(c)(2). This standard requires "a demonstration that. . . includes showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. "Slack v. McDaniel, 529 U.S. 473,484 (2000)(quotation omitted). Because the district court did not grant Sanchez a COA, we proceed to analyze whether a COA should have been granted.

AEDPA establishes a one-year statute of limitations for

federal habeas petitions. § 2244(d)(l). Because Sanchez's conviction became final before AEDPA's enactment, the one-year statute of limitations did not begin to run until AEDPA's effective date, April 24, 1996. Gibson v. Klinger, 232 F.3d 799, 803 (10th Cir. 2000). Thus, absent statutory or equitable tolling, Sanchez had until April 24, 1997, to file his habeas petition. Sanchez does not contend on appeal that he is entitled to statutory tolling; thus, the issue is whether he is entitled to equitable tolling. Sanchez contends that, because he is actually innocent of the firearm charge, the AEDPA statute of limitations should be equitably tolled with respect to that charge. [1]

We have held that equitable tolling is appropriate when a prisoner is actually innocent. Gibson, 232 F.3d at 808; Miller v. Marr, 141 F.3d 976,978 (l0th Cir. 1998). However, the burden is on the petitioner to demonstrate actual innocence.

[1]Sanchez does not contend on appeal that he is actually innocent of the other charges that formed the basis for his conviction.

See Miller, 141 F.3d at 977. In order to show actual innocence, "a petitioner must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. "Schulp v. Delo, 513 U.S. 298, 326-27 (1995).

Having reviewed Sanchez's appellate brief, the magistrate judge's recommendation adopted by the district court, and the material portions of the record on appeal, we conclude that Sanchez has failed to make a debatable showing that he is actually innocent of the firearms charge. A reasonable juror could conclude that, based on the evidence in this case, Sanchez was guilty of this charge beyond a reasonable doubt. For this reason, equitable tolling does not apply, and the district court properly dismissed Sanchez's petition as untimely. No reasonable jurist would debate whether Sanchez's habeas petition should have been granted. Accordingly, Sanchez has failed to make "a substantial showing of

the denial of a constitutional right." § 2253 (c)(2). Sanchez's application for a COA is DENIED, and the appeal is DISMISSED.

ENTERED FOR THE COURT

Carlos F. Lucero

Circuit Judge

FILED
NOV. 26, 2002
U.S. District Court
Western District

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

LUCIANO D. SANCHEZ,

Petitioner,

v. Case No. CIV-O2-1495-R

RON WARD,

Respondent.

REPORT AND RECOMMENDATION

Petitioner, a state prisoner appearing with counsel, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Pursuant to an Order entered by United States District Judge David Russell, the matter has been referred for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B) and (C).

In bringing this action, Petitioner challenges the conviction entered against him in Case No. CF-88-172, District

Court of Grady County, State of Oklahoma. As grounds for relief, he alleges that (1) allowing his inculpatory statement into evidence was error; (2) fundamental error occurred as a result of Petitioner being tried with his co-defendant; (3) the use of a wrong instruction resulted in an excessive sentence for the weapon violation; and (4) his sentences are excessive. As set forth below, it is not necessary to address the merits of these claims based on the recommendation that the Petition be dismissed as time-barred pursuant to the applicable statute of limitations, 28 U.S.C. § 2244(d).

Pursuant to Rule 4 of the Rules Governing Section 2254 Cases, the Court is under an obligation to review habeas petitions promptly and to summarily dismiss a petition "[i]f it plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief. . . ." The issue of the timeliness of the petition is one that may be raised sua sponte by the court. See Williams v. Boone, No.

98-6357, 1999 WL 34856 (10th Cir. Jan. 28, 1999) (unpublished op.)[1] (district court did not err in denying sua sponte the § 2254 petition as untimely"). See also Hardiman v. Reynolds, 971 F.2d 500, 502-04 (10th Cir. 1992) (affirming power of the district court to apply state procedural bar in habeas corpus case sua sponte because the defense implicates non-jurisdictional values that transcend the concerns of the parties and recognizing, as consistent, the summary dismissal authority given to the district courts by the Rules Governing Section 2254 Cases, specifically Rule 4); Kiser v. Johnson, 163 F.3d 326, 328-29 (5th Cir. 1999) (recognizing power of magistrate judge to raise the issue of the § 2244(d) statute of limitations sua sponte in habeas cases as proper and consistent with Rule 4 of the Rules Governing Section 2254 Cases and precedent allowing sua sponte consideration of the issue in civil actions brought by prisoners under 28

[1]This and all other unpublished decisions referenced in this Report are cited for their persuasive value in accordance with 10th Cir. R. 36.3(B).

U.S.C. § 1915).

Based on this Court's initial review of the Petition, it appeared that the Petition was untimely filed. Accordingly, an order was sent to Petitioner directing him to show cause why the Petition should not be dismissed as untimely pursuant to 28 U.S.C. § 2244{d). See Order [Doc. No.4]. Petitioner has now responded to the show cause order [Doc. No.5] and has not raised any basis sufficient to withstand dismissal of the Petition as untimely.

Analysis

The Anti-Terrorism and Effective Death Penalty Act (AEDPA), which took effect on April 24, 1996, establishes a one-year period of limitation for the filing of a habeas corpus petition by a person in custody pursuant to a state judgment. The one-year period generally begins to run from "the date on which the judgment [of conviction] became final by the conclusion of direct review or the expiration of the time for

seeking such review." See 28 U.S.C. § 2244(d)(l)(A); Hoggro v. Boone, 150 F.3d 1223, 1225 (l0th Cir. 1998).

The record shows that Petitioner was convicted, after jury trial, on May 18, 1989. Petitioner's conviction was affirmed on direct appeal by the Oklahoma Court of Criminal Appeals (OCCA) on December 9, 1993. Petitioner's conviction became final ninety days thereafter, on March 9, 1994.

"Because [Petitioner's] conviction was final before AEDPA's enactment, the one-year statute of limitations does not begin to run until AEDPA' s effective date, April 24, 1996." Gibson v. Klinger, 232 F.3d 799, 803 (10th Cir. 2000) (citing Hoggro v. Boone, 150 F.3d at 1225-26); United States v. Simmonds, 111 F.3d 737,744-46 (10th Cir. 1997) (creating one-year grace period beginning on AEDPA's effective date). Utilizing this judicially created grace period, Petitioner had until April 24, 1997, within which to file this action. See Fisher v. Gibson, 262 F .3d 1135, 1142 (l0th Cir.

2001), cert. denied, 122 S.Ct. 1789 (2002). The instant Petition was not filed until October 24, 2002. It is, therefore, untimely unless the limitation period is subject to statutory or equitable tolling.

Statutory Tolling

The AEDPA includes a tolling provision, 28 U. S.C. § 2244(d)(2), which provides that the one-year limitation period is tolled during the time that a properly filed application for state post-conviction relief is pending. Habteselassie v. Novak, 209 F.3d 1208, 1210-11 (10th Cir.2000). See also Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999) (the time tolled includes all periods during which a prisoner is attempting to exhaust state post-conviction remedies). Petitioner first filed for post-conviction relief on May 17, 2001 (see Petitioner's Response at ¶ 4), a date which falls outside the one-year limitation period. See Fisher, 262 F.3d at 1143 ("Fisher's petitions cannot be tolled for time spent in

state post-conviction proceedings because his applications for post-conviction relief were not filed until after April 24, 1997, the end of the limitations period for convictions, like Fisher's, which became final before the effective date of AEDPA."). See also Hill v. State of Oklahoma, No. 01-6060, 2001 WL 1032923 at *2(10th Cir. Sept.10, 2001)(unpublished op.)(finding no basis for statutory tolling pursuant to § 2244(d)(2) where state post-conviction petition was not filed until after one-year limitation period had expired), cert. denied, 122 S.Ct. 1615 (2002); Barnes v. Booher, No. 00-7066, 2000 WL 1346234 at * 1 (10th Cir. Sept.19, 2000) (unpublished op.)(because petitioner's state petition for post-conviction relief was not filed until § 2244(d)'s limitation period had already expired, that petition did not serve to toll the limitation period under § 2244(d)(2)). Therefore, statutory tolling of the limitation period is not available.

Equitable Tolling

The AEDPA's one-year statute of limitations is subject to equitable tolling, "but only in 'rare and exceptional circumstances.'" Gibson v. Klinger, 232 F.3d at 808 (quoting Davis v. Johnson, 158 F.3d 806, 811 (5th Cir.1998). The Tenth Circuit Court of Appeals has recognized that circumstances such as a claim of actual innocence or incompetency may exist where application of the limitation period would possibly render the habeas remedy "inadequate and ineffective" and subject the limitation period to equitable tolling. Miller v. Marr,141 F.3d 976, 977 (10th Cir. 1998). The burden is on the petitioner to demonstrate the circumstances that justify equitable tolling. Miller, 141 F.3d at 977.

Petitioner's claims do not raise issues alleging his actual innocence or mental incompetency, and he otherwise has failed to show any extraordinary circumstances for his failure to timely file his Petition. In responding to the Court's

show cause order, Petitioner's counsel gives only the following explanation as justification for equitably tolling the limitation period:

> The Petitioner has been continuously incarcerated since his conviction and at all times been a lay person not knowledgeable of the law pertaining to his Federal Constitutional rights regarding his convictions. It was not until April 2, 2001, that he found out about such rights and received the financial assistance of his family to employ an attorney.

See Petitioner's Response, ¶ 3. It is well-established, however, that ignorance of the law is not grounds for equitably tolling the limitation period. Marsh v. Soares, 223 F.3d 1217, 1220 (10th Cir. 2000), cert. denied, 531 U.S. 1194 (2001).

Moreover, to be entitled to equitable tolling, a petitioner must first demonstrate that he has diligently pursued his federal claims. Gibson, 232 F.3d at 808. Petitioner did not seek

federal habeas corpus relief until more than five years after the limitation period expired. Petitioner has not pled circumstances sufficient to warrant equitable tolling and has not shown diligence in pursuing his judicial remedies. Consequently, application of the doctrine of equitable tolling is not appropriate here.

RECOMMENDATION

It is recommended that the Petition be dismissed as untimely. Petitioner is advised of his right to file an objection to this Report and Recommendation with the Clerk of this Court by December 16, 2002, in accordance with 28 U.S.C. § 636 and Local Civil Rule 72.1. Petitioner is further advised that failure to make timely objection to this Report and Recommendation waives the right to appellate review of both factual and legal issues contained herein. Moore v. United States, 950 F. 2d 656 (10th Cir. 1991).

The Court Clerk is directed to mail a copy of this Report

and Recommendation to the Respondent for informational purposes.

This Report and Recommendation disposes of all issues referred to the Magistrate Judge in this matter.

ENTERED this 26th day of November, 2002.

/S/ Valerie K. Couch /S/

VALERIE K. COUCH

UNITED STATES

MAGISTRATE JUDGE

FILED
JAN.8, 2003
U.S. District Court
Western District

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

LUCIANO D. SANCEZ,

Petitioner,

v. CIV-O2-1495-R

RON WARD,

Respondent.

ORDER

Before the Court are the Report and Recommendation of United States Magistrate Judge Valerie K. Couch entered November 26, 2002 and Petitioner's Objection to Report and Recommendation. Pursuant to 28 U.S.C. § 636(b) (1)(B), the Court reviews de novo those aspects of the Report and Recommendation to which Petitioner objects.

In his Objection, Petitioner asserts that extraordinary circumstances which would support application of equitable tolling exist in his case because he is factually innocent of the weapon violation and/or that no nexus was shown between the underlying felony of which Petitioner was convicted and possession of the weapon. However, the Court finds that Petitioner has failed to demonstrate that he is factually innocent of possession of a firearm during commission of a felony, after former conviction of a felony. Therefore, the Report and Recommendation is ADOPTED in its entirety and the petition of Luciano D. Sanchez for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 is DISMISSED as untimely.

IT IS SO ORDERED this 8th day of January, 2003.

/S/ David L. Russell /S/

DAVID L. RUSSELL

UNITED STATES DISTRICT JUDGE

FILED
JAN. 8, 2003
U.S. District Court
Western District

IN THE UNITED STATES DISTRICT COURT FOR THE

WESTERN DISTRICT OF OKLAHOMA

LUCIANO D. SANCHEZ,

Petitioner,

v. CIV-02-1495-R

RON WARD,

Respondent.

JUDGMENT

In accordance with the Order entered this 8th day of January, 2003, it is ORDERED, ADJUDGED and DECREED that Respondent have judgment in his favor on the petition for writ of habeas corpus herein.

IT IS SO ORDERED this 8th day of January, 2003.

/S/ DAVID L. RUSSELL /S/

DAVID L. RUSSELL

UNITED STATES DISTRICT JUDGE

FILED
In Court of Criminal Appeals
State of Oklahoma

APR. 24 2001

IN THE COURT OF CRIMINAL APPEALS OF

THE STATE OF OKLAHOMA

JOE STRATMOEN,

Appellant, NOT FOR PUBLICATION

v. Case No. F 2000-292

THE STATE OF OKLAHOMA,

Appellee.

SUMMARY OPINION

JOHNSON, VICE PRESIDING JUDGE:

Appellant, Joe Stratmoen, was tried and convicted by a jury in Wagoner County District Court, Case No. CF 99-262, of Unlawful Possession of Controlled Dangerous Drug (Methamphetamine), in violation of 63 O.S. Supp.1999, § 2-401 (B)(2) (Count 1) and Possession of a Weapon While

Committing a Felony Offense, in violation of 21 O.S. Supp.1999, § 1287, (Count 2) after former conviction of two or more felonies. Jury trial was held on January 31, 2000 and February 2, 2000, before the Honorable G. Bruce Sewell, District Judge. Sentencing was held March 7, 2000, and Judge Sewell sentenced Appellant to thirty (30) years imprisonment on Count 1 and to twenty (20) years imprisonment on Count 2 in accordance with the jury's verdicts. Thereafter, Appellant filed this appeal.

Appellant raised the following three propositions of error:

1. The trial court failed to instruct on the State's burden of proof in the second stage; alternatively, the State presented insufficient evidence of Mr. Stratmoen's former convictions;
2. The jury was erroneously instructed as to the range of punishment in second stage on Count Two;

3. The jury was erroneously instructed as to the minimum range of punishment in second stage of trial on Count One.

After thorough consideration of the propositions raised and the entire record before us on appeal, including the original record, transcripts, and briefs of the parties, we have determined that Appellant's convictions should be affirmed, but Count 2 is modified.

In our analysis of Proposition Two, we begin by recognizing a fundamental rule of statutory construction that "statutes imposing penal sanctions should be strictly construed."Gilbert v. State, 1982 OK CR 100, ¶ 30, 648 P.2d 1226, 1232; see also Gessman v. State, 1972 OK CR 212, ¶ 12, 500 P.2d 1092, 1095 ("Statutes whose sole purpose is to enhance punishment for second or subsequent convictions, or crime, are purely penal in nature and must be strictly construed."), overruled on other grounds in Berry v. State, 1993

OK CR 41, ¶ 11, 834 P2d 1002, 1005. Section 1287 is relatively unique in the manner in which it operates; it cannot exist without another felony having been first committed or attempted.[1]

It is apparent from the Legislature's enactment of § 1287 that it perceived committing or attempting to committ a felony with the use of a firearm or other weapon posed a more serious threat to public security and was thereby deserving of greater punishment. It is not just the simple possession of the firearm or weapon alone that is punished but is instead the use of the weapon in combination with a felony act or attempt.[2] The statute creates a special enhancer for the underlying felony or attempted felony; an extra penalty is imposed "in addition to the penalty provided by statute for the felony

[1]Two other criminal statutes have similar punishment schemes. See 21 O.S.Supp.1999, § 1289.26 (Wearing Body Armor During the Commission of a Felony); 21 O.S.Supp.1999, § 1550 (Possessing Firearm with Removed or Defaced Serial or Identification Number during Commission of a Felony). See also 21 O.S. Supp. 1999, § 1287.1(Penalty Enhancement for Weapon Possession).

committed or attempted." 21 O.S. Supp. 1999, § 1287.

In People v. Honeycutt, 415 N.W.2d 12 (Mich. Ct. App. 1987), the Michigan Court of Appeals addressed whether its statute for Possession of a Firearm During the Commission of a Felony was subject to Michigan's general habitual offender statute. It found the state statutory scheme did not reveal a legislative intent to allow a conviction for Possession of a Firearm During the Commission of a Felony to be enhanced under the habitual offender statute. In so finding, the Court looked to several provisions within the felony-firearm statute. Notably all of the provisions it found relevant to the issue before it are provisions in common with those of Oklahoma's statute.

As does § 1287, Michigan's statute makes Possession of

[2]See Pebworth v. State, 1993 OK CR 28, ¶ 10, 855 P.2d 605, 606 ("In order to establish a violation of [21 O.S.1981, § 1287], more than mere possession must be established. Proof must be shown of a nexus or connection between the possession of the weapon and the underlying felony."); accord Ott v. State, 1998 OK CR 51, ¶ 10, 967 P.2d 472, 476 (interpreting 21 O.S. Supp. 1995, § 1287).

a Firearm During the Commission of a Felony a separate and distinct felony offense from that of the predicate felony and provides graduated penalties for repeated violations. Honeycutt, 415 N.W.2d at 13-14. Also like § 1287, Michigan's statute mandates, by its use of the word "shall," sentencing authority impose the additional term of imprisonment by reason of the defendant's use of a firearm in the course of his felony. Id. at 14. In consideration of these attributes, the Michigan Court of Appeals reasoned their legislature did not intend for their felony-firearm statute and their habitual offender statute to "cross paths." The court said:

> In passing the felony-firearm statute, the Legislature was addressing the problem entailed by criminals carrying firearms during the commission of their crimes and the Legislature addressed that problem by creating the crime of felony-firearm. The habitual offender statute, on the other hand, obviously addresses

the problem of those felons who do not reform their ways even after their initial involvement with the criminal justice system. Both statutes, however, relate to a felon's treatment by the criminal justice system in light of the underlying offense. Thus, we have a situation where a defendant, such as defendant in the case at bar, commits one of the sundry substantive crimes listed in the penal code, such as felonious assault. The Legislature has determined that the crime of felonious assault on its own should be punished with a statutory maximum sentence of four years in prison. However, the Legislature has further determined, through the felony-firearm statute, that a person who commits felonious assault, or almost any other felony, while possessing a firearm shall receive additional prison time [under the felony-firearm statute] in the amount of two, five, or ten years, depend-

ing on the number of prior felony-firearm offenses. By the same token, the person who commits felonious assault may have his maximum possible sentence increased [under the habitual offender statute] to six, eight, or fifteen years, depending upon the number of prior felony convictions the defendant has received. The two statutes, felony-firearm and habitual offender, operate independent of each other and address entirely different societal harms which necessitate imposing a higher punishment on the defendant who also violates either of those statutes, as opposed to the criminal who merely commits the underlying substantive offense.

Finally, we note that the felony-firearm statute possesses it [sic] own habitual offender provision. That statute provides for increased sentences for subsequent felony-firearm convictions. To permit fel-

> ony-firearm convictions to also be enhanced by the habitual offender statute would provide for ever-escalating sentences for subsequent convictions.... We do not believe the Legislature intended such a result.

Honeycutt, 415 N.W.2d at 14 (footnote and citations omitted), The Michigan Court of Appeals concluded that Possession of a Firearm During the Commission of a Felony "may not be supplemented by the habitual offender statute." Id.

If this Court were to adopt the reasoning of the State and hold that the additional penalty imposed by a § 1287 is itself a crime that may be enhanced under Oklahoma's general enhancement statute, 21 0.S.1991, § 51, then the net effect is that an enhancing statute is itself being enhanced. Such a construction would be akin to that which is prohibited in those situations where a conviction is being used as both an element of the offense and as an enhancer. E.g., Snyder v.

State, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654 (Possession of a Firearm After Former Conviction of a Felony cannot be enhanced under 21 O.S.Supp.1985, § 51, by the felony relied upon for the former conviction); Chester v. State, 1971 OK CR 233, ¶ 6, 485 P.2d 1065, 1067 (Escape from the Penitentiary necessarily requires the defendant to be serving a prior felony conviction; the "former felony is implicit in the offense" and "[t]o allow prosecution and enhancement of punishment under § 51 is to add to the maximum punishment allowable...for Escape from the Penitentiary" and is therefore improper);[3] cf Ruth v. State, 1998 OK CR 50, ¶¶ 5-14, 966 P.2d 799, 800-01 (indicating the offense of possession of a firearm while under supervision of Department of Corrections may properly be enhanced under 21 0.S.1991, §51, be-

[3]After Chester was decided, the Legislature amended the Escape from the Penitentiary statute to permit enhancement with certain prior convictions when an escapee has prior felony convictions other than those for the offenses he was serving when he escaped. 21 O.S. Supp.1999, § 443(D).

cause that offense can occur without there necessarily being an existing felony conviction).

Other jurisdictions have also held that a circumstance which causes an enhanced penalty cannot be cause for further enhancement under another enhancement statute or the jurisdiction's general recidivist statute. These "double enhancement" circumstances have generally been found improper unless there exists specific expression by the legislature that the resulting double enhancement was intended. E.g., People v. Jones, 22 Cal. Rptr.2d 753, 754-57 (Cal. 1993)(held it was improper to use the same prior kidnapping conviction to enhance defendant's sentence under two different enhancement statutes); Oliveira v. State, 751 So.2d 611 (Fla. App., Dist. 4, Nov 24, 1999) (where misdemeanor battery was elevated to a felony by reason of its commission upon a law enforcement officer, offense could not be further enhanced under the habitual felony offender statute); People

v. Thomas, 664 N.E.2d 76, 85 (Ill. 1996)("Double enhancement occurs when a factor already used to enhance an offense or penalty is reused to subject a defendant to a further enhanced offense or penalty."); State v. Chapman, 287 N.W.2d 697, 698 (Neb. 1980)(offenses which are felonies because the defendant has been previously convicted of the same crime do not constitute "felonies" within the meaning of prior felonies that enhance penalties under the habitual criminal statute); State v. Grissom, 956 S.W.2d 514, 518 (Tenn. Crim. App. 1997)(use of enhancer that looked to whether the amount of money taken from the victim was particularly great held to be "double enhancement" where the theft crime being prosecuted had itself been elevated. based upon the amount taken by the accused); cf Weaver v. State, 702 N.E.2d 750, 752 (Ind. Ct. App. 1998)(fact that operating a vehicle while intoxicated was made a felony because of prior convictions did not also prohibit it from being further

enhanced under habitual substance offender statute where legislature specifically amended such statute to include felony convictions for operating a vehicle while intoxicated).

We find the State could not seek enhancement of Count 2 under Oklahoma's general enhancement scheme set forth at 21 O.S.Supp.1999, § 51.1. The trial court should have instructed the jury the proper range of punishment was two (2) to ten (10) years imprisonment, in accordance with the specific enhancement provisions set forth in 21 O.S.Supp.1999, § 1287. We note the jury imposed the minimum sentence under the range it was given. For the above reasons, we hereby order Appellant's conviction on Count 2 should be AFFIRMED, but his sentence is hereby MODIFIED to the minimum of two (2) years imprisonment.

As to Proposition One, we find no specific instruction on the State's burden of proof was necessary as Appellant stipulated to his prior convictions. A defendant "does not receive

a jury determination of guilt if he stipulates to his prior convictions in the second stage of a bifurcated trial. "Dodd v. State, 1999 OK CR 20, ¶ 7, 982 P.2d 1086, 1088-89. Further, Appellant's stipulation was sufficient to establish his prior convictions were obtained in accordance with the law and Appellant did not establish any defect in the prior convictions. Rosteck v. State, 1988 OK CR 11, ¶ 7, 749 P.2d 556, 558.

Proposition Three also does not warrant relief. The record before this Court reflects the jury was properly instructed on the range of punishment for Count 1 in accordance with the provisions set forth at 63 O.S. Supp.1999, § 2-401(D).

DECISION

The Judgment and Sentence imposed in Count 1 is hereby AFFIRMED. Appellant's conviction in Count 2 is AFFIRMED, but his sentence MODIFIED to a term of two (2) years imprisonment.

APPEARANCES AT TRIAL

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ATTORNEYS FOR APPELLEE

OPINION BY: JOHNSON, V.P.J.:

LUMPKIN, P.J.: CONCURS IN PART/DISSENTS IN PART

CHAPEL, J.: CONCURS

STRUBHAR, J.: CONCURS

LILE, J.: CONCURS IN PART/DISSENTS IN PART

RB

LUMPKIN, PRESIDING JUDGE: CONCUR IN PART/ DISSENT IN PART

I concur in the Court's affirmance of the judgment and sentence in Count I and the judgment in Count II. However, I must dissent to the modification of the sentence in Count II.

Judge Lile has correctly analyzed Oklahoma Statutes and caselaw. The Court's opinion has not applied the applicable law in this case. Instead, the Court seeks to invoke irrelevant caselaw from the State of Michigan. I join in Judge Lile's analysis and would affirm the jury's assessment of punishment and the sentence in Count II.

LILE, JUDGE: CONCURS IN PART/ DISSENTS IN PART

Oklahoma statutes specifically tell us how to apply the general recidivist provisions to substantive felony provisions, and we have consistently followed that procedure. 21 O.S.Supp.1988, § 11 states in pertinent part:

> "[A]n act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, except that in cases specified in Sections 51 and 54 of this title, the punishments therein prescribed are substituted for those prescribed for a first offense."

"A plain and unambiguous statute is to be applied and not interpreted, since such a statute speaks for itself, and any attempt to make it clearer is a vain labor and tends only to obscurity." 73 Am. Jur.2d Statutes § 194 (1974). We need not consider rules of construction if the statute is clear upon its face. See In Re Guardianship of Campbell, 1966 OK

99,450 P.2d 203, 205.

The majority opinion relies upon People v. Honeycutt, 415 N.W.2d 12 (Mich.Ct.App.1987), in which that court based its conclusions upon Michigan statutes which are dissimilar to Oklahoma statutes and are not compelling. The Honeycutt case cites no Michigan statute where their legislature has specified how to the apply the specific and general enhancement provisions.

Section 1287 provides that a person who possesses a firearm while committing a felony "shall be guilty of a felony" which "*shall be a separate offense.*" (Emphasis added.) When a defendant has prior felony convictions, which are not convictions under § 1287, the penalty specified in § 51, not less than twenty *(20)* years imprisonment, should be substituted for that prescribed for a first offense under § 1287: "not less than two (2) years nor more than ten (10) years for the first offense." Stratmoen had two (2) prior felony convic-

tions, but none under § 1287. Our § 51 applies by its terms to all felonies, which includes violations of § 1287. Further, if construction of § 1287 were required, "legislative enactments dealing with the same subject matter must be construed together as a harmonious whole so as to give effect to each." In Re Guardianship of Campbell, 1966 OK 99, 450 P.2d at 205. Our statutes, § 11, § 51, and § 1287, when read together, are clear, unambiguous, and harmonious, and require no interpretation. There is no reason why Stratmoen should escape the clear recidivist provisions of § 11 and § 51.

By analogy, the statute punishing Armed Robbery (21 0.S.1991, § 801) provides for an increased punishment upon the third Armed Robbery conviction. In Chambers v. State, 1988 OK CR 255, 764 P.2d 536, 538, we held that where all of the defendant's prior convictions were for armed robbery, enhancement was required to be pursued under the armed

robbery statute, but where the prior felonies were mixed, that is, any of the prior felonies are for crimes other than armed robbery, then enhancement may be pursued under §51. In Chambers, the prior convictions were mixed, and we said that the prosecutor could properly elect to proceed under either statute.

We have reached the same conclusion concerning drug offenses. The statutes punishing drug offenses included within Title 63 provide for increased punishment for second and subsequent drug offenses. In Jones v. State, 1990 OK CR 17, 789 P.2d 245,247, we said:

> "This Court has held that when both the predicate and the new offense are drug offenses, any enhancement must be made pursuant to the provisions of the Uniform Controlled Dangerous Substances Act, 63 O.S.Supp.1985, § 2-201 et seq. Faubion v. State, 569 P.2d 1022, 1025 (Okl.Cr.1977). We have also held

that when the new offense is a drug offense, but the predicate offense is non-drug, it is proper to enhance under the general habitual offender statute, 21 0.S. Supp.1985, § 51. Hayes v. State, 550 P.2d 1344, 1348 (Okl.Cr.1976). However, where an appellant is charged with both drug and non-drug predicate offenses, it is permissible to provide for enhancement under either statute. Novey v. State, 709 P.2d 696, 699 (Okl. Cr. 1985). Under such circumstances, the prosecution must make an election as to which enhancement it wishes to pursue. Id."

We have reached the same conclusion in our interpretation of the statute prohibiting Forcible Sodomy of a Child Under Sixteen, which contains a specific recidivist enhancement provision. Applegate v. State, 1995 OK CR 49, ¶14, 904 P.2d 130, 135; 21 0.S.Supp.1992, § 888. We said in Applegate, "Because the prior felony convictions alleged by

the State did not involve forcible sodomy, enhancement of the forcible sodomy convictions was proper only under the general enhancement statutes." Id.

We have specifically held that a person who merely possesses a firearm after former conviction of at least two felonies (21 0.8.1991, § 1983) is subject to the enhancement provisions of § 51, with one of the felonies to be listed on page one of the information as an element of the offense, and the other prior felony (or felonies) to be listed on page two of the information to enhance punishment. Snyder v. State, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654. Snyder had three (3) prior felony convictions and thus his sentence was properly enhanced. Under the logic of today's decision, a defendant who has mere possession of a gun with two prior felonies (§ 1283) is subject to greater punishment than the same defendant who commits a new felony with the additional element of using the firearm (§ 1287). This was surely not

the intent of the legislature. It would be an absurd result that Appellant could be punished more harshly for mere possession of a gun than for using the same gun to commit a new crime. It would also be an absurd result to say that the State must allege one less element to make the crime simple Felonious Possession of a Firearm After Former Conviction of a Felony in order to obtain a greater punishment.

The majority cites Snyder v. State, 1989 OK CR 81, ¶ 4, 806 P.2d 652, 654, for the proposition that Possession of a Firearm After Former Conviction of a Felony cannot be enhanced under 21 O.S.Supp.1985, § 51 by the same felony relied upon for the former conviction. That sound holding, however, has no application to the instant case, as no prior felony conviction is required to convict for violating § 1287. Under Snyder, you must be a previously convicted felon in order for possession of a firearm to be a felony (§ 1283), and felonious possession of a firearm is subject to § 51 enhance-

ment if the defendant has an additional prior felony (or felonies) over and above the one used to prove the case of felonious possession of a firearm. Snyder, 1989 OK CR 81, ¶ 4, 806 P.2d at 654, specifically held that "this court stated unequivocally that the Habitual Criminal Act, 21 O.S.1981, § 51 can be applied [to felonious possession of a firearm]." Citing Butler v. State, 1968 OK CR 107, § 3, 442 P.2d 532.

In one respect, Possession or a Firearm While Committing a Felony (§ 1287) is different than the crime of Possession of a Firearm After Former Conviction of a Felony (§§ 1283 and 1284): *A* higher punishment is specifically set forth in § 1287 for a second conviction of that section. However, this difference does not require a different result. Appellant had no prior conviction for Possession of a Firearm While Committing a Felony (§ 1287). Therefore, the specific enhancement provision of § 1287 could not apply, and general enhancement under § 51 should be permitted.

In accord with years of precedent in analogous offenses, § 51 may be applied to Appellant in this case, just as we have said § 51 may be applied to a defendant charged with Robbery with Firearms (Chambers, 1988 OK CR 255, 764 P.2d at 538), Obtaining Controlled Drug by Forged Prescription *(Hayes,* 1976 OK CR 113, 550 P.2d at 1348), Possession of Controlled Dangerous Substance (Marihuana) With Intent to Distribute (Jones, 1990 OK CR 17, 789 P.2d at 247), or Forcible Sodomy of a Child under Sixteen (Applegate, 1995 OK CR 49, ¶ 14, 904 P.2d at 135).